No. 80-649

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDISON ELECTRIC INSTITUTE, *et al.*,
Petitioners,

v.

DOUGLAS M. COSTLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

This Petition for a Writ of Certiorari arises out of Electric Utilities' attempt to obtain review of the 24-hour national ambient air quality standard for sulfur dioxide (SO_2), as interpreted by EPA some nine years after the standard's promulgation.

The 24-hour national ambient SO_2 standard was promulgated by EPA in 1971 under § 109 of the Clean Air Act. This standard, in 40 C.F.R. Part 50, determines the emission control requirements that apply to every coal- and oil-fired industrial facility in the nation. The cost of those controls—indeed, the very ability of such facilities to continue to operate lawfully or to be constructed—is directly related to the stringency of the 24-hour standard. *See* Edison Electric Institute, Petition for Writ of Certiorari at 5-6 (Oct. 20, 1980) (hereinafter "Petition for Certiorari").

Part 50 specifies that compliance with the 24-hour standard is to be evaluated using "calendar day" averages.[1] As now interpreted by EPA, however, the Part

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[1] EPA has asserted that Part 58 does not change the ambient standard because the standard permits the Agency to determine compliance by using any averaging technique that yields a 24-hour value so long as the statistical method "detects more violations." *See* Respondent's Brief in Opposition at 3 n.2 (December 1980) (hereinafter "Respondent's Br."). EPA's assertion is not supported by the language of Part 50 which provides that "violations" of the 24-hour standard can only be determined in accordance with "the reference *method* described in Appendix A to this part, or by an equivalent *method*." 40 C.F.R. § 50.4 (1980), App. 99 (emphasis added). The reference *method* referred to in § 50.4 requires that one compliance determination be taken each day "from midnight to midnight." 40 C.F.R. § 50, Appendix A, 7.1.2 (1980), App. 109. Similarly, the equivalent *method* mandates that "[f]or sulfur dioxide, no more than . . . one (1) 24-hour measurement shall be made per day." 40 C.F.R. § 53.32(f) (1980), App. 129. Thus, calendar day averages are the compliance method specified by the terms of Parts 50 and 53 and, therefore, Part 50 neither authorizes nor contemplates the use of "running" 24-hour averages in determining whether the 24-hour standard has been violated.

58 ambient air quality reporting requirements promulgated in May 1979 supercede the calendar day compliance method and require enforcement of the 24-hour standard using "running averages."[2] This change in the method for evaluating compliance—which enlarges the compliance periods from 365 such periods to 8,737—increases the stringency of the 1971 standard by 30 to 40 percent. Petition for Certiorari at 11; App. 159.

The court below dismissed Electric Utilities' petition to review EPA's attempt to shift enforcement of the standard from calendar day averages to running averages. If this dismissal is allowed to stand, Electric Utilities will, by virtue of § 307(b) of the Clean Air Act, be forever barred from challenging the validity of this more stringent 24-hour SO_2 standard. Respondent opposes review by this Court. For the reasons stated below, the grounds urged by Respondent for denial of Electric Utilities' Petition for Certiorari are without merit.

I. EPA Failed to Give the Public Adequate Notice of the Intended Effect of the Part 58 Rulemaking

Respondent admits that if the effect of the Part 58 reporting requirements on the Part 50 SO_2 ambient standard had been ambiguous at the time the Part 58 rules were promulgated, a petition for judicial review would, as Electric Utilities contend, have been appropriate at a later date.[3] According to Respondent, however,

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[2] With the calendar day method, a violation occurs upon finding a second exceedance out of 365 values, whereas, under the running averages method, a violation occurs upon finding a second exceedance out of 8,737 possible values. Petition for Certiorari at 11.

[3] *See* Respondent's Br. at 6 n.3, 7. The Respondent's alleged distinction of the line of District of Columbia Circuit authority cited by Electric Utilities (Respondent's Br. at 6) relies entirely upon the Respondent's *ex cathedra* pronouncement that the Part 58 regulations unambiguously communicated a change in the

the effect of the Part 58 reporting requirements on the Part 50 SO_2 ambient standard was made clear and unambiguous when the Part 58 rules were promulgated. This notice, Respondent asserts, was given by the terms of a *footnote* in one of the six appendices to the Part 58 regulations and by an *unpublished guideline* document referred to in that footnote.[4] Respondent's Br. at 2.

The very obscurity of the reference relied upon by Respondent belies the accuracy of EPA's assertion of clarity. Had EPA intended to impose a new, more rigorous compliance method for a standard that applies throughout the nation and affects all of industry, the Agency was required to announce such a profound change prominently and directly. It cannot satisfy its notice obligation by relying upon a footnote that is buried in the midst of 45 *Federal Register* pages of highly technical regulatory provisions—a footnote that itself cannot be understood without reading a guideline document that was not made available to the general public.

EPA also seems to rely upon the preamble to the proposed rules as providing the necessary notice. Respondent's Br. at 2. The inadequacy of this "notice" is perhaps best demonstrated by the content of the rulemaking comments received by EPA. *Not one comment was received from any member of industry on the Agency's "proposal" to change the compliance method and in-*

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method for determining compliance with the Part 50 standard. Respondent appear to imply that, if the regulations were indeed ambiguous on this point, as Petitioners contend, the District of Columbia Circuit cases require the course of prior administrative resolution which Electric Utilities attempted. Respondent's Br. at 5, 6 & n.3.

[4] App. 157-59. The guideline document referred to in Appendix F was never incorporated by reference in accordance with 1 C.F.R. Part 51 (1980). Indeed, the document was not even made available to the public by filing a copy at the Office of the Federal Register.

crease the stringency of the 24-hour standard by as much as 40 percent. Not one comment on this issue was received, of course, because no one in industry knew that this was the Agency's intent. Indeed, Electric Utilities have, for the past three years, been participating in EPA's ongoing pre-rulemaking activities to evaluate whether revisions of the Part 50 SO_2 ambient standard are required. *See* Clean Air Act § 109(d). The Part 58 rulemaking was never discussed during this evaluation, nor was a change to a running averages compliance method ever even mentioned.

The terms of the preambles to both the proposed and final rules further show why Respondent's characterization of Part 58's "clarity" is without support. First, while Respondent admits that the Part 58 rules as interpreted by EPA significantly increase the stringency of the Part 50 standard, the Part 50 regulations were never discussed or even mentioned in the preambles to the Part 58 rulemaking. Second, Respondent in its brief correctly observes that the Part 58 regulations were promulgated in accordance with § 319 of the Act—a provision dealing with standardization of ambient monitoring networks, not national ambient air quality standards. Section 109, the statutory provision authorizing the Agency to promulgate and revise national ambient air quality standards, was never even mentioned in the Part 58 rulemaking.[5] It was similarly ignored in Respondent's brief. *See* Respondent's Br. at 1. Finally, in the Part 58 rulemaking, EPA did not make any of the numerous findings required by § 109 of the Clean Air Act, nor did EPA follow the procedures required by § 307(d) of the Act for revising the Part 50 ambient standards.[6]

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[5] *Cf.* National Tour Brokers Ass'n. v. United States, 591 F.2d 896 (D.C. Cir. 1978).

[6] Petition for Certiorari at 11 n.16.

These considerations lead to one inescapable conclusion —the purported effect of the Part 58 rules on the Part 50 SO_2 ambient standard was *totally* unclear until EPA responded in March 1980 to Electric Utilities' request for a definitive interpretation of these rules.[7] Since Electric Utilities filed their petition to review within 60 days of this final Agency action,[8] the petition was timely, and it was improper for the court below to dismiss it.

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[7] Respondent implies that Electric Utilities "sought to avoid" such available courses as petitioning for review or intervening in *PPG* v. *Costle* and chose instead to seek clarification from the Administrator of an ambiguity which was Electric Utilities' own creation. Respondent's Br. at 5. Respondent does not hazard to suggest what possible motivation could induce Electric Utilities to embark voluntarily on such a circuitous course. The facts are that the PPG petitioners filed their petition to review the Part 58 rules as a "protective" matter after learning that an EPA Region may have used running averages in finding a violation of the 24-hour standard in Summit County, Ohio. Petition for Certiorari at 9 n.14. Electric Utilities did not learn until the fall of 1979 that this EPA Regional Office viewed Part 58 as changing the compliance method for the Part 50 SO_2 ambient standard. This was after the expiration of the 60-day period for seeking review of the Part 58 rule and after the time for intervention of right in *PPG* v. *Costle*. Electric Utilities, inasmuch as they had no knowledge of the purported change in the regulations until well after the period for judicial review and for intervention as of right had expired, cannot be charged with knowledge of that local interpretation as grounds for depriving them of judicial review. Rather, it was proper, and in accordance with the law of the District of Columbia Circuit, for Electric Utilities to ask that the Administrator of EPA issue a definitive interpretation of his rules before filing any petition to review. *See* Petition for Certiorari at 9-10 n.14, 15 n.22.

[8] Respondent does not find *PPG* v. *Harrison* to be applicable to this case. Respondent correctly observes that the parties in *PPG* v. *Harrison* stipulated that the action of the Regional Administrator was "final action" under 5 U.S.C. § 551 *et seq.* (1976) but then concludes that no similar concession is appropriate here because EPA's letter responding to Electric Utilities' request for interpretation merely reaffirmed what had previously been determined

II. Substantial Due Process Concerns Are Presented by this Case

Electric Utilities petitioned to review EPA's Part 50 ambient standard after being notified of a definitive administrative interpretation of that standard which, by EPA's own admission, will substantially increase its stringency. Since the national primary ambient standards are the mainspring of EPA's health-based regulation, the change signalled by this interpretation will work a profound alteration of Electric Utilities' legal obligations under the Clean Air Act.[9]

The decision of the District of Columbia Circuit in this case operates to deny Electric Utilities the opportunity ever to be heard on this significant national issue. As described above,[10] neither the proposed regulations nor the final regulations provided adequate notice of this change in the standard. As a result, Electric Utilities were never provided an opportunity to submit comments in the rulemaking proceeding or to file a timely petition

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in the regulations. Respondent's Br. at 7. In attempting to make this distinction, Respondent ignores the fact that, in *PPG* v. *Harrison*, this Court found jurisdiction even though the Agency's response to a request for interpretation merely reaffirmed a previous EPA determination. An even more fundamental flaw in Respondent's argument is the suggestion that the concessions of the parties in *Harrison* could be dispositive on the question of jurisdiction. It is axiomatic that the parties, by their agreement, cannot create jurisdiction where none exists. Thus, it is appropriate to conclude that this Court determined in *Harrison* that a Regional Administrator's reaffirmation of an agency determination in response to a request for interpretation was indeed final agency action.

[9] Among other things, emission limitations implementing primary national ambient air quality standards must be attained without regard to the technological or economic feasibility of compliance. *See* Union Electric Co. v. EPA, 427 U.S. 246 (1976).

[10] *See* pp. 2-5 *supra*.

for judicial review.[11] Rather, it was not until the Administrator's response to Petitioners' request for interpretation that notice of this change was first officially communicated. Should the Court uphold the District of Columbia Circuit's denial of jurisdiction to review this administrative interpretation, Electric Utilities will be forever denied appellate review of this significant change in the standard and will be barred by § 307(b) from litigating the validity of this change in subsequent proceedings. In its brief in opposition, Respondent, making the assumption that the Part 58 regulations were ambiguous on their face,[12] offers two arguments which it believes should lead this Court to let the lower court's order of dismissal stand.

First, Respondent contends that the issue of inadequate notice "is not of sufficient importance to merit review . . . since no member of the affected industry could plausibly maintain in the future that it was unaware of what the Administrator meant by the language in question." Respondent's Br. at 7. Respondent's position in this first argument seems to be that, as long as a regulated company is afforded notice of its legal obligations, it does not matter whether the company is denied judicial review to challenge the validity of those obligations. This argument seems to forget the fundamental principle that due process requires notice *and* an opportunity to be heard. Providing companies with notice is an empty gesture if it comes at a time or in a manner which prevents those companies from being heard.[13]

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[11] *See* note 7 *supra*.

[12] Respondent's Br. at 7.

[13] Respondent has also attempted to belittle the importance of this case by claiming that it "raises only a narrow issue tied to the particular language involved." Respondent's Br. at 7. It is hard to understand from what legal tradition Respondent has learned that the denial of an opportunity to be heard raises issues of little significance. Even if Respondent can find a tribunal which would countenance such an idea, its assertion is nonetheless factually

Second, Respondent argues that Electric Utilities are not prejudiced by the inadequacy of notice in this case because all of Electric Utilities' arguments have been presented to the District of Columbia Circuit in *PPG* v. *Costle*. To date, the only filing from Petitioners in the *PPG* case is Electric Utilities' amici brief. This brief, however, only described the administrative action taken by Electric Utilities, and explained how that action might resolve the issues before the court in the *PPG* litigation. Electric Utilities did *not* present their arguments on the merits, as Respondent implies.[14] In-

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unsupportable. The change in the ambient standard effected by Part 58 is not particularized or parochial but rather national in scope. The ambient standard has a direct and tangible effect on the industrial growth of communities throughout the United States and on the nation's future energy options. Petition for Certiorari at 5-6. Moreover, it leaves a further misimpression to maintain that the issue presented "is tied to the language involved." As EPA's response in opposition makes clear, a major change in the 24-hour standard was made on the basis of an oblique reference in a footnote in one of numerous appendices to highly technical regulations. *See* pp. 2-3, *supra*. The permissibility of making such profound changes in such an obscure manner is a question which transcends the specific "language involved" in this case.

[14] Respondent implies that Electric Utilities' amici brief was filed at a time when Electric Utilities were aware of the Administrator's interpretation of Part 58 and could therefore present all their arguments on the merits of this interpretation. This is simply not true. Throughout its statement of the case, Respondent depicts the course of regulatory activity and court filings in sequence. Inexplicably, Respondent departs from this faithfulness to the sequence of events when describing the filing of Electric Utilities' amici brief in the *PPG* case. Although the amici brief was filed on December 3, 1979, more than four months before the issuance of the Administrator's interpretation, Respondent mentions the filing of the amici brief after a court filing which occurred on April 25, 1980. Respondent's Br. at 4. Thus, in Respondent's brief, it appears as though the framing of the amici brief could benefit from and challenge the Administrator's interpretation. As the contents of this brief reveal, this solitary filing

deed, Electric Utilities' brief on the merits, filed in June 1980, was not considered by the court in dismissing Electric Utilities' petition to review and is not before the Court of Appeals in the *PPG* case.[15]

Finally, while the PPG petitioners have made certain arguments in the *PPG* case that are similar to arguments that would be made by Electric Utilities, the only certain way in which Electric Utilities' interests would be protected by the outcome of the *PPG* case is if the District of Columbia Circuit accepts PPG's arguments and sets aside the Part 58 regulations. That result, however, is only a possibility, and this *possibility* is no substitute for an opportunity to be heard and to have Electric Utilities' arguments on the validity of *both* the Parts 50 and 58 regulations considered by the Court before decision.[16] Equally important, the District of Columbia Circuit could affirm EPA in *PPG* v. *Costle* and the petitioners in *PPG* could decide not to seek review of that decision. If this occurred, Electric Utilities would have no opportunity to ask this Court to review this significant change in the 24-hour SO_2 standard and would be forever bound by the result in the *PPG* case.

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by Electric Utilities in the *PPG* case does not present Electric Utilities' arguments on the merits of EPA's significant change in the SO_2 ambient standard.

[15] Given Respondent's implication in its brief to this Court that Electric Utilities had had an opportunity to submit their views on the merits to the court below in the *PPG* case, Electric Utilities filed on January 7, 1981, a motion for leave to file their brief on the merits as a supplemental amici brief. The District of Columbia Circuit denied that motion on January 14, 1981, thereby foreclosing Petitioners from ever presenting their views on the merits in that case.

[16] The petition to review filed in *PPG* v. *Costle* cites Parts 51, 52, 53 and 58 of EPA's regulations. Electric Utilities' petition, which was dismissed by the court below, specifically requested that the court review both the Part 58 regulations *and* the Part 50 ambient standard. *See* Petition for Certiorari at 9, 12.

CONCLUSION

In view of the pendency of the *PPG* case in the District of Columbia Circuit and the desirability of resolving as soon as possible all challenges to the validity of the Part 50 standard as construed by EPA, Electric Utilities urge the Court to grant the petition for the writ of certiorari and summarily remand this case to the Court of Appeals for the District of Columbia Circuit for consolidation with *PPG Industries* v. *Costle.*

Respectfully submitted,

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